

SERVICE DATE – JUNE 28, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 736

INTERVISTAS STUDY

Digest:<sup>1</sup> This decision denies a request to reconsider an earlier decision that granted in part and denied in part a request for workpapers.

Decided: June 25, 2018

BACKGROUND

On January 26, 2018, the Western Coal Traffic League (WCTL) renewed a request seeking certain workpapers underlying the study performed by InterVISTAS Consulting LLC (InterVISTAS Report). Further background regarding the InterVISTAS Report, which is available on the Board's website under "E-Library" and "Studies," can be found in the notice served on October 12, 2016, in this docket.

In its request, WCTL sought "copies of the workpapers and data supporting, and sufficient to replicate" specified calculations in the InterVISTAS Report relating to the Board's Three-Benchmark and Simplified Stand-Alone Cost tests. (WCTL Request 1-2.) According to WCTL, providing the requested workpapers and data "will facilitate WCTL's review of the [InterVISTAS] Report and is consistent with the Board's stated desire to consider the [InterVISTAS] Report findings and analyses 'in open and transparent fora.'" (Id. at 2 (citation omitted).)

In a decision served on February 28, 2018 (Decision), the Board granted WCTL's request in part and denied it in part. Workpapers in the Board's possession responsive to the request that did not contain confidential information were provided to WCTL. Two workpapers that contained confidential data subject to protective orders in other cases and other workpapers that contained confidential waybill data were not released. On March 20, 2018, WCTL filed a petition for reconsideration. For the reasons stated below, the Board will deny the petition for reconsideration.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

## DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, the claim on reconsideration must be one that, if successful, “would mandate a different result.” See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int’l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

Although WCTL does not specify the grounds for its reconsideration petition, because WCTL only argues that the Decision is “predicated on an incorrect legal analysis,” (Pet. for Recons. 7), its petition is based on material error. As discussed below, WCTL has failed to show material error.

WCTL contends that “[t]he Board instituted EP 736 for two purposes: (1) to hold an expert roundtable; and (2) to obtain stakeholder comments on the InterVISTAS Report.” (Pet. for Recons. 7; see also Pet. for Recons. 13-14 (asserting that the Board said “it plans to receive public comments on the Report” and the Board “instituted a proceeding to receive comments on the Report”).) WCTL cites the Board’s October 12, 2016 notice. (Id.) That notice, however, does not request “stakeholder comments on the InterVISTAS Report,” and the Board has not subsequently sought such comments. See InterVISTAS Study, EP 736, slip op. at 1-2 (STB served Oct. 12, 2016).<sup>2</sup>

WCTL also argues that the Board routinely grants workpaper requests. (Pet. for Recons. 7-8.) In support, WCTL cites four decisions either providing workpapers or announcing their availability. (Id. at 8.)<sup>3</sup> But all of the decisions cited by WCTL involve a Board adjudication, rulemaking, or (in the case of the cited decision in Docket No. EP 290 (Sub-No. 2)) the regulatorily-required quarterly RCAF issuance. They did not involve a general subject matter study, such as the InterVISTAS Report, or a situation, such as the one here, where the Board has not proposed or even suggested any adjudicatory or regulatory action.<sup>4</sup> WCTL

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<sup>2</sup> While the October 12, 2016 notice issued by the Director of the Office of Proceedings stated that the Board “intends to hold a public hearing on the report” at some point in the future, to date, the Board has not noticed such a hearing.

<sup>3</sup> See Adoption of the Unif. R.R. Costing Sys. as a Gen. Purpose Costing Sys. for All Regulatory Costing Purposes, 5 I.C.C.2d 894, 897 n.7 (1989); R.R. Cost Recovery Procedures, EP 290 (Sub-No. 2), slip op. at 1 (STB served Jan. 5, 2000); W. Fuels Ass’n v. BNSF Ry., NOR 42088 (Sub-No. 1), slip op. at 10 (STB served July 27, 2009); Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No. 1), slip op. at 2 (STB served May 6, 2016).

<sup>4</sup> To the extent that WCTL refers to separate statements (see Pet. For Recons. 13-14), a  
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ignores the Board's statement in the Decision that it is *not* the Board's standard operating procedure to distribute confidential information in the absence of a Board proposal or request for analysis. See Decision, slip op. at 2 (noting that "it is not uncommon for confidential waybill data to underlie studies (some conducted by the Board and some by third parties, such as other federal and state agencies), and allowing any interested stakeholder to access this confidential information merely because it believes that the information might facilitate review of those studies could create a precedent that unduly expands access to confidential waybill data.").

Similarly, WCTL argues that denying access to the confidential workpapers "violates WCTL's basic administrative due process rights." (Pet. for Recons. 9; id. at 14 (referring to "a longstanding [tenet] of STB practice, firmly rooted in basic principles of administrative law, that requires disclosure of study workpapers").) WCTL cites United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977). (Pet. for Recons. 9.) But Nova Scotia Food Products does not support WCTL's position; rather, it demonstrates why the Decision is correct. The court in Nova Scotia Food Products was specifically addressing the disclosure of scientific information relied upon by an agency in connection with a rulemaking proceeding to ensure an adequate record. See 568 F.2d at 244, 249, 251-52. Here, in contrast, there is no proposed rule, or even a preliminary proposal, that relies on the InterVISTAS Report. See Decision, slip op. at 2.

With respect to the two workpapers that are subject to a protective order in another proceeding,<sup>5</sup> WCTL states that the Board has the authority to disclose information subject to a protective order. (Pet. for Recons. 10-11.) WCTL cites cases in which the Board either reserved the right to include information subject to a protective order in its public decision or stated that parties could petition to modify a protective order to extend to a new proceeding. (Id.<sup>6</sup>) But the existence of authority to release information subject to protective orders does not mean that it would have been appropriate to make the requested disclosure here or that it was material error not to have done so. In other words, even though the Board has the authority to release such information to WCTL, which was not a party to the other proceeding (see Decision, slip op. at 2), WCTL must still present an adequate basis for disclosing the sensitive information that is the subject of that protective order. WCTL has not provided a compelling rationale for disclosure here.<sup>7</sup> As discussed above, allowing any stakeholder to obtain confidential

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separate expression by an individual Board member is not a statement of the Board and does not provide a basis for releasing the information sought here.

<sup>5</sup> See W. Fuels Ass'n v. Burlington N. & Santa Fe Ry., NOR 42088 (STB served Nov. 10, 2004).

<sup>6</sup> See Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305, slip op. at 4 (STB served Nov. 22, 2011); Montana v. BNSF Ry., NOR 42124, slip op. at 2 n.3 (STB served Apr. 26, 2013); Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 n.2 (STB served Jan. 11, 2018).

<sup>7</sup> WCTL suggests in passing that, by the Decision's logic, the Board violated its own protective order by sharing confidential waybill information with InterVISTAS. However, as

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information merely to facilitate review of a general study would unduly expand access to protected information.

As for workpapers containing confidential waybill data, WCTL argues that these workpapers are “already in the EP 736 record” and that the Board has misconstrued WCTL’s workpaper request as a request for access to confidential waybill data. (See Pet. for Recons. 12-13.) WCTL is incorrect. The workpapers at issue are not contained in the InterVISTAS Report itself, have not been included in the EP 736 docket, and have not otherwise been disclosed by the Board. Moreover, because the requested workpapers contain confidential waybill data, the Board properly construed WCTL’s request as one for confidential waybill data.

Finally, WCTL contends that the Board’s concerns about releasing confidential data “can be easily addressed by an appropriate protective order.” (Pet. for Recons. 8, 15.) But the mere possibility of a protective order does not address the underlying issue of whether the data should be disclosed. Indeed, the Board’s waybill access regulations require the equivalent of a protective order (referred to as a “confidentiality agreement” in 49 C.F.R. § 1244.9(b)(4)(v)), but access to the data itself is nonetheless subject to a rigorous needs-based analysis (see, e.g., 49 C.F.R. § 1244.9(b)(4), (e)). The Board has held this data close despite the availability of confidentiality agreements because, as a matter of process, limiting dissemination of sensitive data decreases the likelihood that the information will be improperly used or disclosed. See Procedures on Release of Data from the ICC Waybill Sample, 4 I.C.C.2d 194, 200-201 (1987).

For the reasons stated above, WCTL fails to demonstrate material error that would lead the Board to materially alter its prior action. Accordingly, the petition for reconsideration will be denied.

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller. Board Member Miller concurred with a separate expression.

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noted above, the Board does have authority to release information subject to protective orders. See n.6, supra. In any event, the Board’s disclosure of relevant information to Board employees and contractors is not governed by protective orders.

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BOARD MEMBER MILLER, concurring:

I concur in this decision finding that WCTL has failed to demonstrate that the Board committed material error in denying its request for the workpapers underlying the InterVISTAS Report. However, since the Board's initial denial of the confidential workpapers, the Rate Reform Task Force—which is charged with exploring alternative rate reasonableness methodologies—has ramped up its work, most notably by holding informal meetings with stakeholders to discuss options and ideas for reforming the Board's rate review methodologies. Based on the direction that the task force takes, releasing the confidential InterVISTAS workpapers may eventually be warranted.